BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTOR MORALES Claimant	)	
VS.	)	
INTERNATIONAL PAPER COMPANY Respondent	)	Docket No. 1,057,820
AND	)	
FEDERAL INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 21, 2013, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on December 10, 2013. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Brandon A. Lawson of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant was injured out of and in the course of his employment with respondent on May 20, 2011. The ALJ found the opinions of Drs. Barrett and Murati to hold equal weight and awarded claimant a five percent impairment of function to the body as a whole. Claimant is entitled to all outstanding and unauthorized medical up to the statutory limit, with future medical treatment considered upon proper application to the Division. Further, the ALJ determined claimant's average weekly wage is $422.50.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the greater weight of credible evidence shows claimant's injury occurred in February 2011. Claimant contends the opinions of Dr. Murati should hold greater weight than those of Dr. Barrett, as Dr. Barrett did not review claimant's later medical record. Moreover, claimant contends he is entitled to a 70.5 percent work

disability based upon a 100 percent wage loss and a 41 percent task loss. Further, claimant argues his average weekly wage was incorrectly calculated and should be $456.36.

Respondent maintains claimant did not suffer an accidental work injury nor provide notice of an alleged work injury in February 2011 and should not receive compensation benefits. However, should the date of accident be upheld as May 20, 2011, respondent agrees the ALJ's Award should be affirmed with the exception of the award for future medical benefits. Respondent contends claimant did not provide evidence of necessary future medical treatment.

The issues for the Board's review are:

1. What is the date of accident?

2. Was proper notice given?

3. Did claimant's accidental injury arise out of and in the course of his employment with respondent?

3. What is claimant's average weekly wage?

4. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began employment with respondent in December 2006. Claimant performed a variety of duties, though mostly he operated a forklift and loaded trucks. This position required such activities as bending, lifting, stooping, pushing, pulling, standing, sitting, grasping, writing, climbing, driving, and reaching. Claimant worked for respondent until August 26, 2011, when he was terminated.

In early February 2011, claimant testified he was removing a rain suit after loading trucks in the rain when he slipped on the wet floor and felt a pop in his back. He did not fall to the pavement. As a result, claimant stated he experienced pain in his lower back. Claimant testified he reported the accident to his plant supervisor, Cesar Mendoza, and was provided over-the-counter pain medication. Claimant also stated he reported the accident to Ascencion Mendoza, who is Cesar Mendoza's father and claimant's team leader. Neither Cesar nor Ascencion Mendoza had any recollection of claimant reporting an injury in February 2011. Claimant testified his job duties were changed to sorting plastic and paper following the incident.

Claimant testified he sustained a prior accident at respondent in 2007, when he slipped on some ice and injured his low back. Claimant stated he reported that injury to

respondent at the time but did not receive any settlement or seek any treatment. Claimant testified he occasionally experienced problems with his low back since his 2007 fall, but did not have any other significant prior low back problems.

Respondent utilized IRIS, a computer system, to report accidents. Bridget Lemen, an employee of respondent's for over 20 years, testified she was never provided any information by claimant of an on-the-job injury sustained in February 2011. However, Ms. Lemen stated IRIS noted one incident concerning claimant dated May 20, 2011, whereby claimant was "taking off his rain suit, and he felt a little glitch in his back."[1] This report indicated claimant "felt slight discomfort along the backside of his left leg and towards his back."[2] Claimant returned to his regular duties. Claimant did not request medical treatment until after his August 2011 termination.

Respondent has a bonus program for its employees based upon recordable workplace incidents. Ms. Lemen stated respondent had been seven years without a recordable incident. She explained how a recordable incident is defined:

> If a person, like you said, loses time away from work, and then there's various other determinations – excuse me, prescription medication, you know, somebody breaks a bone, it is just dependent on the severity of the incident.[3]

If no recordable incident occurs in a 365-day period, all payroll employees receive a $200 bonus. Claimant stated his coworkers often would not report accidents for this reason. Cesar Mendoza testified the start date for the bonus program was the anniversary of the last recorded incident. Respondent's employees received their bonus in April 2011.

Claimant continued to perform his regular job duties. On August 26, 2011, claimant testified he was loading a train car with bales when he noticed some bales were loose. Claimant stated he did not want to load loose bales but was told to do so by Ascencion Mendoza. Claimant testified he refused to load the loose bales and was subsequently terminated by Cesar Mendoza. Claimant stated he was upset and accidentally touched Cesar Mendoza's arm with his finger when he turned while walking away.

Ascencion Mendoza testified claimant refused to perform an assigned job. Cesar Mendoza testified claimant was terminated for striking a supervisor. Ms. Lemen's written note indicates four reasons for claimant's suspension:

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[1] P.H. Trans. at 21.

[2] P.H. Trans., Resp. Ex. 1 at 1.

[3] P.H. Trans. at 25.

1. Speeding too close to a pedestrian
2. Not listening to instructions
3. Poking Cesar in the chest with his fist
4. Reckless driving into the bale stack causing them to fall.[4]

Cesar Mendoza explained claimant drove too close and too fast to him with the forklift before striking a stack of bales; however, claimant testified he did not collide with anything in the forklift nor did he drive too close to Cesar Mendoza. Cesar Mendoza stated claimant poked him in the chest with a finger. Cesar Mendoza explained he did not have any independent memory of the events at the time of his deposition, though the reports generated by Ms. Lemen and himself were an accurate reflection of what transpired August 26, 2011.

Dr. Sapna Shah-Haque, claimant's family physician, examined claimant on October 4, 2011, regarding claimant's complaints of low back pain. Claimant testified he had seen Dr. Shah-Haque occasionally for back pain since his fall in 2007. Dr. Shah-Haque prescribed pain medication, physical therapy, and the use of ice packs and heating pads. Claimant followed up with Dr. Shah-Haque on November 1, 2011, when it was noted clamant's low back pain was improving.

Dr. Sandra Barrett, a board certified physical medicine and rehabilitation physiatrist, became claimant's authorized treating physician following a preliminary hearing on November 1, 2011. Claimant initially presented to Dr. Barrett with low back pain, with no radiation into the legs, numbness, or tingling. Dr. Barrett referred claimant to a six-week course of physical therapy.

On March 12, 2012, claimant was again seen by Dr. Barrett. She diagnosed claimant with resolved low back pain with lumbar strain. Claimant was placed at maximum medical improvement with no restrictions. Dr. Barrett testified claimant's x-rays were unremarkable, and his physical examination did not show any significant deficits; therefore, she did not see any need for formal restrictions on claimant. Further, Dr. Barrett stated that based upon her note of March 12, 2012, she did not see that claimant had any permanent impairment from his injury.

Dr. Pedro Murati, a board certified independent medical examiner, evaluated claimant at his counsel's request on both December 5, 2011, and September 26, 2012. On December 5, 2011, Dr. Murati examined claimant for purposes of treatment recommendations. Claimant presented with increased low back pain with twisting and sitting too long, trouble sleeping due to low back pain, and the need to stand and occasionally walk to relieve his back pain. Claimant informed Dr. Murati his pain began in February 2011 after feeling a pop in his back while removing a rain suit. After reviewing

[4] Cesar Mendoza Depo., Ex. 3 at 1.

claimant's medical history and performing a physical examination, Dr. Murati diagnosed claimant with low back pain with signs and symptoms of radiculopathy and bilateral SI dysfunction. Dr. Murati recommended claimant undergo an MRI of the lumbar spine and a bilateral lower extremity NCS/EMG. Further, Dr. Murati noted claimant should receive the appropriate physical therapy, anti-inflammatory and pain medications, and steroid injections.

Claimant returned to Dr. Murati on September 26, 2012, for an independent medical evaluation and rating. At that time, claimant presented with low back pain, occasional tingling down the left leg, and difficulty sleeping due to low back pain. Dr. Murati noted claimant had an MRI of the lumbar spine and an epidural steroid injection in April 2012 and July 2012, respectively. After performing a physical examination and reviewing claimant's additional medical history, Dr. Murati's diagnosis was low back pain with signs of radiculopathy. Dr. Murati recommended claimant have the following permanent restrictions: no bending, crouching, stooping, crawling, or lifting greater than 20 pounds; occasional lifting, carrying, pushing or pulling of 20 pounds; frequent lifting, carrying, pushing or pulling of 10 pounds; claimant should rarely climb stairs, climb ladders, or squat; occasional sitting and driving; frequent standing and walking; and claimant should alternate between sitting, standing, and walking. Dr. Murati testified the restrictions were made necessary by the slip accident of February 2011, and barring any other reasonable explanation, the slip incident is the prevailing factor in claimant's condition. He recommended claimant have an annual physical examination due to the probability of complications to the low back, and opined claimant needs chronic pain management.

Using the AMA *Guides*,[5] Dr. Murati placed claimant in Lumbosacral DRE Category III for a 10 percent whole person impairment based upon the low back pain with signs of radiculopathy.

Doug Lindahl, a vocational expert, met with claimant at his counsel's request on October 11, 2012, to prepare a report and task list. Mr. Lindahl used an interpreter during his meeting with claimant. Claimant cannot read English. Claimant has had six or seven previous jobs over the 15 years prior to February 2011, resulting in a list of 22 unduplicated tasks. Dr. Murati reviewed the task list prepared by Mr. Lindahl. Of the 22 unduplicated tasks on the list, Dr. Murati opined claimant was unable to perform 9 for a 41 percent task loss.

Claimant stated he is currently not working due to his permanent restrictions. He has not worked anywhere since his termination from respondent.

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[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-510e(a)(C) reads, in part:

> An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
>
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

ANALYSIS

1. What is the date of accident?

The Board agrees with the ALJ's finding that the date of accident is May 20, 2011. The weight of the evidence supports this finding. The Board has held in many prior decisions that the ALJ and the Board may change the date of accident to conform to the evidence.[6]

2. Was proper notice given?

Since the respondent admits that they had timely notice of a May 20, 2011 injury, this is no longer an issue. The respondent had timely notice of an accidental injury arising out of and in the course of claimant's employment.

3. Did claimant's accidental injury arise out of and in the course of his employment with respondent?

The Board agrees with the ALJ that claimant suffered an accidental injury arising out of his employment. Claimant's description of the accident is credible. The accident was reported the same day to the respondent. There is no credible evidence in the record to support a finding that the injury did not occur in the manner described by claimant.

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[6] See *Hahn v. Midwest Drywall Co.*, No. 258,223, 2003 WL 21688479 (Kan. WCAB June 30, 2003); *Tedder v. Phil Blocker, Inc.*, Nos. 264,296 & 264,297, 2002 WL 598489 (Kan. WCAB Mar. 29, 2002); *Chilgren v. Topeka State Hospital (State of Kansas)*, No. 202,008, 1995 WL 715328 (Kan. WCAB Nov. 17, 1995); *Cozad v. Boeing Military Airplane Co.*, No. 169,966, 1998 WL 229853 (Kan. WCAB Apr. 24, 1998), *aff'd*; 27 Kan. App. 2d 206, 2 P.3d 175 (2000); *Wagner v. Interstate Brands Corporation,* Nos. 222,155 & 222,156, 1998 WL 304289 (Kan. WCAB May 15, 1998); and *Davenport v. Hallmark Cards, Inc.,* No. 165,642, 1998 WL 462612 (Kan. WCAB July 27, 1998).

Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[7]

3. What is claimant's average weekly wage?

The claimant alleges that he earned $11.33 per hour and that he worked 40 hours per week. His testimony is inconsistent with the only wage statement placed into evidence, which was also inconsistent. Based upon the wage statement, claimant worked only one 80 hour two-week period. He earned $848.00, which is $10.60 per hour. On average, claimant worked 70.16 hours per payroll period. It is impossible to tell, based upon the varying hours and gross pay amounts that are inconsistent with the hourly rate, exactly what the claimant earned in regular time and overtime. The Board finds that the ALJ correctly calculated the average weekly wage pursuant to K.S.A. 2011 Supp. 44-511(b)(1).

4. What is the nature and extent of claimant's disability?

The ALJ averaged the ratings of two expert physicians and awarded a 5 percent functional impairment. While averaging the ratings is not mandated nor prohibited, in some instances it is appropriate. The Board has concluded on numerous occasions in prior opinions that it is appropriate to average the ratings provided by the doctors.[8] This is such a case. Neither of the two rating physicians were shown to lack credibility. As such, their opinions should be given equal weight.

K.S.A. 44-510e(a)(c)(i) requires an injured worker to have a functional impairment, solely caused by the injury, that exceeds 7½ percent to be entitled to permanent partial general disability. Claimant has failed to meet the statutory threshold and is limited the 5 percent functional impairment.

CONCLUSION

Claimant suffered an injury arising out of his employment with respondent on May 20, 2011. Respondent received timely notice of the accidental injury. Claimant suffered a 5 percent impairment of function. Claimant's average weekly wage is $422.50, resulting in a compensation rate of $281.68.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 21, 2013, is affirmed.

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[7] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[8] *See Phillips v. State of Kansas*, No. 1,045,139, 2010 WL 1918581 (Kan. WCAB Apr. 14, 2010).

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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John D. Clark, Administrative Law Judge